

## **CHAPTER 25-01.2 DEVELOPMENTAL DISABILITY**

### **25-01.2-01. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Developmental disability" means a severe, chronic disability of a person which:
  - a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;
  - b. Is manifested before the person attains age twenty-two;
  - c. Is likely to continue indefinitely;
  - d. Results in substantial functional limitations in three or more of the following areas of major life activity:
    - (1) Self-care;
    - (2) Receptive and expressive language;
    - (3) Learning;
    - (4) Mobility;
    - (5) Self-direction;
    - (6) Capacity for independent living; and
    - (7) Economic sufficiency; and
  - e. Reflects the person's needs for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.
2. "Institution or facility" means any school, hospital, residence center, group home, or any other facility operated by any public or private agency, organization, or institution, which provides services to developmentally disabled persons.
3. "Least restrictive appropriate setting" means that setting which allows the developmentally disabled person to develop and realize the person's fullest potential and enhances the person's ability to cope with the person's environment without unnecessarily curtailing fundamental personal liberties.
4. "Service or services for developmentally disabled persons" means services provided by any public or private agency, organization, or institution, directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of a developmentally disabled person.

### **25-01.2-02. Appropriate treatment, services, and habilitation - Treatment in least restrictive appropriate setting.**

All persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for those disabilities. Treatment, services, and habilitation for developmentally disabled persons must be provided in the least restrictive appropriate setting.

### **25-01.2-03. Presumption of incompetence prohibited - Discrimination prohibited - Deprivation of constitutional, civil, or legal rights prohibited.**

No developmentally disabled person may be presumed to be incompetent or may be deprived of any constitutional, civil, or legal right solely because of admission to or residence at an institution or facility or solely because of receipt of services for developmentally disabled persons. However, nothing in this section may be construed to limit or modify section 16.1-01-04. The constitutional, civil, or legal rights which may not be varied or modified under the provisions of this section include:

1. The right to vote at elections;
2. The free exercise of religion;
3. The right of reasonable opportunities to interact with members of the opposite sex; and
4. The right to confidential handling of personal and medical records.

**25-01.2-04. Mail, telephone, and visitation rights - Application to residential institution or facility.**

Except as provided in this section, every person who resides in a mental health or developmental disabilities institution or facility has the right of private, unimpeded, uncensored communication with persons of the resident's choice by mail, telephone, and visitation.

1. The facility director shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for private visitation is available.
2. The facility director may establish in writing reasonable times and places for use of telephones and for visits, provided that a resident's ability to contact an attorney may not be restricted and provided that any rules or restrictions must be posted in each residential facility. A copy of any rules or restrictions must be given to all residents over eighteen years of age and to the parents or guardian of all residents under eighteen years of age, upon admission.

This section applies only with respect to an institution or facility that provides residential care.

**25-01.2-05. Personal property - Application to residential institution or facility.**

Except in the circumstances and under the conditions provided in this section, every resident of an institution or facility must be permitted to receive, possess, and use lawful personal property and must be provided with a secure, convenient, and reasonable amount of storage space for that property.

1. The facility director may restrict the possession and use of certain classes of property which may be dangerous or may harm a resident.
2. Notice of any restrictions must be given in writing to all residents over eighteen years of age and to the parents or guardian of all residents under eighteen years of age, upon admission.
3. When a resident is discharged from the institution or facility, all of the resident's lawful personal property which is in the custody of the facility must be returned to the resident.

This section applies only with respect to an institution or facility that provides residential care.

**25-01.2-06. Labor - Wages - Money - Application to residential institution or facility.**

A resident or service recipient may consent to perform labor for a service provider if the professional responsible for overseeing the implementation of that resident's individual habilitation plan determines that the labor would be consistent with that plan.

1. A resident or service recipient who performs labor which is of any consequential economic benefit to a service provider shall receive wages which are commensurate with the value of the work performed, in accordance with applicable federal and state laws and regulations. A resident may be required to perform tasks of a personal housekeeping nature without compensation.
2. A resident may use the resident's money as the resident chooses, unless the resident is a minor, is prohibited from doing so under a court guardianship or conservatorship order, or the use would be inconsistent with the resident's individual habilitation plan. A minor or a person under guardianship or conservatorship may be required to deposit the person's money with the service provider, or in a financial institution in the name of a parent, guardian, or conservator, and may be permitted to use the money in accordance with written instructions of the parent, guardian, or conservator.
3. A resident may deposit money, or cause money to be deposited, in the resident's name with a financial institution of the resident's choice, or the resident may deposit the money with a service provider. The service provider may not retain any money deposited with the service provider under this subsection, but shall hold all such funds in an account in the resident's name. All earnings attributable to a resident's money shall accrue to the resident.
4. No service provider nor any of the service provider's employees shall be made representative payee for a resident's social security, pension, annuity, trust fund, or

any other form of direct payment or assistance without the resident's informed consent.

5. When a resident is discharged, all of the resident's money, including earnings, shall be returned to the resident.

This section applies only with respect to an institution or facility that provides residential care.

**25-01.2-07. Medical and dental services - Application to residential institution or facility.**

All residents of an institution or facility are entitled to appropriate and adequate medical and dental services, which must be provided by qualified professionals who are licensed to practice or are otherwise authorized to provide medical and dental services pursuant to state and federal law and regulations. This section applies only with respect to an institution or facility that provides residential care.

**25-01.2-08. Medication - Chemical restraints.**

No person receiving services at any institution or facility for the developmentally disabled may at any time be administered any drug or medication, or be chemically restrained or tranquilized in any manner, except upon the written authorization of a licensed physician when necessary and appropriate as an element of the service being received or as a treatment of any medical or physical condition in conformity with accepted standards for that treatment. The nature, amount of, and reasons for the administration of any drug or medication must be promptly recorded in the person's medical record.

**25-01.2-09. Punishment - Isolation - Physical restraints - Psychosurgery - Sterilization - Shock treatment.**

No person receiving services at any institution or facility for the developmentally disabled may at any time:

1. Be subjected to any corporal punishment.
2. Be isolated or secluded, except in emergency situations when necessary for the control of violent, disturbed, or depressed behavior which may immediately result, or has resulted, in harm to that person or other persons.
3. Be physically restrained in any manner, except in emergency situations when necessary for the control of violent, disturbed, or depressed behavior which may immediately result, or has resulted, in harm to that person or to other persons.
4. Be subjected to psychosurgery, sterilization, medical behavioral research, or pharmacological research, except in conformity with an order of a court of competent jurisdiction. Under no circumstances may a person receiving treatment be subjected to hazardous or intrusive experimental research which is not directly related to the specific goals of that person's treatment program.
5. Be subjected to electroconvulsive therapy or shock treatment without that person's written and informed consent. If the recipient of services is a minor, the recipient's parent or guardian may provide informed consent for that treatment which the parent or guardian believes to be in the recipient's best interests.

**25-01.2-10. Seclusion or physical restraint - Facility administrator to be notified.**

Whenever a person is placed in seclusion or is physically restrained, the facility administrator or the administrator's representative must be notified and shall determine if the isolation or restraint is necessary. The isolation or restraint may be continued only upon written order of the administrator or the administrator's representative and for a period of not more than twenty-four hours. Any person who is in seclusion or who is physically restrained must be checked by an attendant at least once every thirty minutes.

**25-01.2-11. Psychosurgery, sterilization, or research - Court order required - Hearing - Right to attorney at public expense - Application to residential institution or facility.**

A court of competent jurisdiction may issue the orders required for the procedures or treatments in subsection 4 of section 25-01.2-09 upon application of the party alleging the necessity of the procedure, the person who is receiving or is entitled to receive the treatment, or the person's guardian, following a hearing on the application.

1. The person receiving or entitled to treatment shall:
  - a. Receive prior notice of the hearing;
  - b. Have the right and the opportunity to present evidence; and
  - c. Have the right to be confronted with and to cross-examine witnesses.
2. If the developmentally disabled person is indigent, counsel shall be provided at public expense not less than ten days before the hearing.
3. The burden of proof is on the party alleging the necessity of the procedure or treatment.
4. An order allowing the procedure or treatment may not be granted unless the party alleging the necessity of the procedure or treatment proves by clear and convincing evidence that the procedure is in the best interest of the recipient and that no less drastic measures are feasible.

This section applies only with respect to an institution or facility that provides residential care.

**25-01.2-12. Diet - Application to residential institution or facility.**

Every resident of any institution or facility must be provided with a nutritionally adequate and sufficient diet planned by a qualified dietician. This section applies only with respect to an institution or facility that provides residential care.

**25-01.2-13. Education.**

Every developmentally disabled child is entitled to a free and appropriate education in the least restrictive appropriate setting in accordance with chapter 15.1-32.

**25-01.2-14. Individualized habilitation or education plan - Contents.**

Any institution, facility, agency, or organization that provides services for developmentally disabled persons shall have a written, individualized habilitation plan developed and put into effect for each person for whom that institution, facility, agency, or organization is primarily responsible for the delivery, or coordinating the delivery, of services. A school must have an individual educational plan for each of its developmentally disabled students. A plan required under this section must:

1. Be developed and put into effect within thirty days following admission of the person.
2. Be reviewed and updated from time to time, but no less than annually.
3. Include a statement of the long-term habilitation or education goals for the person and the intermediate objectives relating to the attainment of those goals. The objectives must be stated specifically, in sequence, and in behavioral or other terms that provide measurable indices of progress.
4. State an objective criteria and an evaluation procedure and schedule for determining whether the objectives and goals are being achieved.
5. Describe the personnel necessary for the provision of the services described in the plan.
6. Specify the date of initiation and the anticipated duration of each service to be provided.
7. State whether the developmentally disabled person appears to need a guardian and determine the type of protection needed by the individual based on the individual's actual mental and adaptive limitations and other conditions which may warrant the appointment of a guardian. Any member of the individual habilitation plan team may petition, or notify any interested person of the need to petition, for a finding of incapacity and appointment of a guardian.

**25-01.2-15. Right to refuse services.**

An adult recipient of services, or, if the recipient is a minor or under guardianship, the recipient's guardian or parent, must be given the opportunity to refuse generally accepted mental health or developmental disability services, including medication, unless those services are necessary to prevent the recipient from causing serious harm to the recipient or to others. The facility director shall inform a recipient or guardian or parent of a minor who refuses generally accepted services of alternate services available, the risks of those alternate services, and the possible consequences to the recipient of the refusal of generally accepted services.

**25-01.2-16. Notice of rights.**

Every facility shall post conspicuously in public areas a summary of the rights which are set out in this chapter. In addition, upon commencement of services or as soon after commencement as the recipient's condition permits, every recipient who is eighteen years of age or older, the parents of all recipients under eighteen years of age, and the guardian of a minor recipient or other recipient under guardianship must be given written notice of the rights guaranteed by this chapter.

**25-01.2-17. Enforcement of rights.**

Every developmentally disabled person is entitled to enforce any of the rights guaranteed by this chapter by civil action or any other remedy available by common law or statute. In any proceeding to enforce these rights, the court may, in its discretion, award reasonable attorney's fees and costs to a successful plaintiff. A developmentally disabled person who is successful in an administrative proceeding may also be awarded reasonable attorney's fees and costs. Any award of attorney's fees and costs must be in addition to any actual or punitive damages to which the person may be entitled.

**25-01.2-18. Authority to adopt rules.**

The director of the state department of human services may adopt, in accordance with chapter 28-32, any rules necessary to implement this chapter. The superintendent of public instruction may adopt rules to implement this chapter in schools. The rules adopted may not restrict or limit the rights guaranteed by this chapter.